Kuan Shin @ Kuan Nyong Hin v Chin Foh Trading Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — RAYUAN SIVIL NO W-02-1296-2011
ABDUL WAHAB PATAIL, LIM YEE LAN AND VARGHESE GEORGE JJCA
25 NOVEMBER 2014

Civil Procedure — Appeal — Admission of fresh evidence — Whether applicant satisfied conditions in rr 7(3) and (3A) of the Rules of the Court of Appeal 1994 to admit new evidence — Whether new documents allowed to be introduced would be treated as 'non-admitted' or 'ID' at appeal hearing subject to further submissions of parties

In a civil suit filed by a company named Sedia Makmur Sdn Bhd ('SMSB') against the respondents in the High Court, the appellant and SMSB were two out of seven parties the respondents had filed a counterclaim against. The High Court struck out SMSB's claim on its failure to attend the trial and granted judgment to the respondents on their counterclaim which resulted in an appeal against that decision to the Court of Appeal. By two instant interlocutory applications the appellant sought leave of the Court of Appeal to admit various new documents as part of the appeal record. These included a company search report on SMSB and statements of accounts and relevant documents evidencing monies paid by SMSB to the first respondent (encl 13(a)) and a police report and other documentary evidence to show that a witness at the High Court had committed perjury (encl 26(a)). The interlocutory applications were made pursuant to s 69 of the Courts of Judicature Act 1964 and r 7 of the Rules of the Court of Appeal 1994 ('the Rules'). Inter alia, the appellant averred that because SMSB was dissolved, it failed to adduce any evidence at the trial; the documents now sought to be included could not have been obtained with reasonable diligence at the trial; that the new evidence was credible and if it had been produced at trial, it would have had an important influence on the trial court's decision on the counterclaim. The respondents objected to the admission of the documents on the ground, inter alia, that they would be denied the opportunity to cross-examine relevant persons as to the subject-matter of the documents to test their veracity.

Held, allowing the applications with costs of RM5,000:

(1) As the conditions under rr 7(3) and (3A) of the Rules were satisfied, encl 13(a) was allowed with the caveat the appellant was to file a separate core-bundle containing the additional documents which would be

A treated at the appeal hearing in similar nature as 'non-admitted' or 'ID' documents only subject to further submissions of the parties. The respondents' objection was basically as to the relevance and weight to be attached to the documents if at all they became material in the consideration of the appeal. The respondents would still be entitled to B put forward their arguments on those aspects (see paras 18 & 11).

(2) Since the documents sought to be admitted in encl 26(a) was allowed to be admitted by the Court of Appeal in another appeal involving the same parties, this court, to be consistent, allowed the application. The respondents were not precluded from raising any issue as to the relevance C of the documents at the hearing of the appeal proper (see paras 20–21).

[Bahasa Malaysia summary

Dalam guaman sivil yang difailkan oleh syarikat bernama Sedia Makmur Sdn D Bhd ('SMSB') terhadap responden-responden di Mahkamah Tinggi, perayu dan SMSB adalah dua daripada tujuh pihak yang responden-responden telah memfailkan tuntutan balas. Mahkamah Tinggi membatalkan tuntutan SMSB atas kegagalan untuk menghadiri perbicaraan dan memberikan penghakiman kepada responden-responden atas tuntutan balas mereka yang mengakibatkan E rayuan terhadap keputusan Mahkamah Rayuan. Melalui dua permohonan interlokutori ini, perayu memohon kebenaran Mahkamah Rayuan untuk memasukkan pelbagai dokumen baru sebagai sebahagian daripada rekod rayuan. Ini termasuk laporan carian syarikat ke atas SMSB dan pernyataan akaun dan dokumen relevan menunjukkan keterangan wang yang dibayar oleh F SMSB kepada responden pertama (lampiran 13(a)) dan laporan polis dan keterangan dokumentar lain untuk menunjukkan bahawa saksi di Mahkamah Tinggi melakukan sumpah bohong (lampiran 26(a)). Permohonan interlokutori dibuat berikutan s 69 Akta Kehakiman Mahkamah 1964 dan k 7 Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah'). Antara lain, G perayu berhujah bahawa oleh kerana SMSB dibubarkan, ia gagal untuk mengemukakan apa-apa keterangan semasa perbicaraan; dokumen-dokumen sekarang dipohon untuk dimasukkan tidak dapat diperolehi dengan usaha yang munasabah semasa perbicaraan; bahawa keterangan baru boleh dipercayai dan jika ia telah dikemukakan semasa perbicaraan, ia mungkin H mempunyai pengaruh yang penting ke atas keputusan mahkamah perbicaraan atas tuntutan balas. Responden-responden membantah kepada kemasukan dokumen-dokumen atas alasan, antara lain, bahawa mereka akan dinafikan peluang untuk memeriksa balas orang-orang relevan sebagai perkara subjek dokumen untuk menguji kebenaran mereka.

I

Diputuskan, membenarkan permohonan-permohonan dengan kos sebanyak RM5,000:

(1) Memandangkan syarat-syarat di bawah kk 7(3) dan (3A) Kaedah-Kaedah dipenuhi, lampiran 13(a) dibenarkan dengan kaveat

perayu dikehendaki untuk memfailkan teras ikatan yang berasingan mengandungi dokumen tambahan yang mana akan dianggap di pendengaran rayuan dalam sifat yang sama sebagai 'non-admitted' atau dokumen-dokumen 'ID' hanya tertakluk kepada hujahan selanjutnya pihak-pihak. Bantahan responden-responden adalah secara asasnya terhadap kerelevanan dan berat yang diletakkan kepada dokumen-dokumen sekiranya ia menjadi material dalam pertimbangan rayuan tersebut. Responden-responden masih akan berhak untuk mengemukakan hujahan-hujahan mereka ke atas aspeks tersebut (lihat perenggan 18 & 11).

(2) Memandangkan dokumen yang dipohon untuk dimasukkan ke dalam lampiran 26(a) dibenarkan dimasukkan oleh Mahkamah Rayuan dalam rayuan lain melibatkan pihak yang sama, mahkamah ini, untuk menjadi konsisten, membenarkan permohonan tersebut. Responden-responden tidak dikecualikan daripada membangkitkan apa-apa isu terhadap kerelevanan dokumen-dokumen pada masa perbicaraan rayuan betul (lihat perenggan 20–21).]

Notes

For cases on adducing fresh evidence, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 770–802.

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812, CA (refd)
Hue Ngee On v Chai Woo Siew (as public officer of the Hakka Association Kulai, Johor) [2009] 5 MLJ 176, CA (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70, FC (refd)
Maxisegar Sdn Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 1, CA (refd)

Legislation referred to

Courts of Judicature Act, 1964 s 69, 69(1), (2), (3)
Rules of the Court of Appeal 1994 r 7, 7(3), 7(3A)

Appeal from: Civil Suit No D5–22–718 of 2006 (High Court, Kuala Lumpur)

Harpal Singh Grewal (Fiona Bodipalar, Natasha Louis and Reny Rao with him) (Bodipalar Ponnudurai De Silva) for the appellant.
Christie Soosay Nathan (Mohamad Fakhzan bin Mohd Noor with him) (Alvin John & Partners) for the respondent.

Varghese George JCA:

[1] Both the aforesaid interlocutory applications by the appellant were heard by us on 11 December 2013.

[2] *ENCLOSURE 13(a)* was an application pursuant to s 69 of the Courts of Judicature Act 1964 and r 7 of the Rules of the Court of Appeal 1994 to admit the following as part of the appeal record:

> (a) Company search for Sedia Makmur Sdn Bhd ('Sedia Makmur') dated 29.6.2012 which is annexed and marked as Exhibit 'A-1' in the Affidavit in Support of this Application;
>
> (b) the statement of accounts and the relevant documentation from 1.2.2005 to 30.9.2005 evidencing monies were paid from Sedia Makmur to 1st Respondent which is annexed and marked as Exhibit 'A-2' in the Affidavit in Support of this Application.

[3] Enclosure 13(a) was supported by an affidavit affirmed by the appellant. Basically it stated that the plaintiff in the original suit was one Sedia Makmur Sdn Bhd (SMSB) who was also the first named defendant in the counterclaim brought by the respondents.

[4] SMSB did not participate in that trial and only the counterclaim was heard and disposed by the court. SMSB had been 'dissolved' as evidenced by document A-1 (Search Report on SMSB) now sought to be admitted as a further document for purpose of the appeal.

[5] It was further averred that the court which heard the counterclaim had in 29 April 2011 allowed judgment to be entered against the appellant and others in the sums of RM37,098,913.51.

One of the allegations of the respondents at the trial of the counterclaim was that there were no goods sold and delivered by SMSB to the first respondent and accordingly the payments made to SMSB (by way of bankers acceptance facilities of the first respondent) were wrongfully made based on fictitious transactions and falsified documents.

[6] The appellant further averred as follows:

> 9 At the High Court proceedings, as a result of Sedia Makmur's non-attendance and hence their claim being struck off, Sedia Makmur had not adduced any evidence at the High Court trial. I have since discovered that Sedia Makmur was in fact dissolved at the time ot the trial and could not have in any event produce any evidence.

10 As these statements of accounts and supporting documents are Sedia Makmur's documents and were not privy to the same, we were not able to obtain and/or produce these documents at the High Court trial.

11 I am advised by my solicitors and verily state as follows:

11.1 The new evidence produced above could not have been obtained with reasonable diligence at the High Court trial;

11.2 If the new evidence that we obtained above had been produced in the High Court trial, it would have had an important influence on the decision of the High Court Judge;

11.3 The new evidence produced above is credible evidence.

[7] The documents sought to be admitted and collectively stated as 'A-2' were essentially correspondence, banking transactions records and statements of SMSB with their bankers, Alliance Bank.

[8] This application was understandably objected to by counsel for respondents who submitted that the documents, in particular in 'A-2' could have been obtained by the appellant if due diligence had been exerted to locate the same. Further, the appellant himself (although a named defendant in the counterclaim) had not testified at the trial but was now seeking to adduce these further documents; this was an abuse of process of court.

[9] It was also highlighted to us that those documents on the face of it did not indicate for what purposes the payments by SMSB had been made to the first respondent.

In any event, it was contended that there would be serious prejudice occasioned to the respondents if the documents under A-2 were allowed to be introduced at this stage, as the respondents had been denied an opportunity to cross-examine relevant persons as to the details of the subject transactions involved and/or to test the veracity of the documents.

[10] Counsel for the appellant in reply stated that the court ought to give due consideration to the fact that these documents were in fact documents of a third party (not of the appellant) which the appellant had just managed to secure.

[11] In our assessment the objection raised by the respondents was basically as to the relevance and weight, that ought to be attached to those documents by the appellate court, should it become material in the consideration of the

appeal if at all. The respondents would still be entitled to put forward their arguments on those aspects and they would not be precluded in that respect if the documents in A-2 were allowed.

[12] Section 69(3) of the Courts of Judicature Act 1964 ('CJA 1964') was the legislative provision enabling the appeal court to admit further evidence and it reads as follows:

> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, *shall be admitted on special grounds only*, and not without leave of the Court of Appeal. (emphasis added)

(Section 69(2) provided that no leave was required to adduce further evidence in the case of interlocutory applications and in respect of matters which had occurred after the date of decision).

[13] The procedural rules dealing with admission of further evidence at the appeal stage was spelt out at r 7(3) and r 7(3A) of the Rules of the Court of Appeal 1994 ('RCOA 1994'). Rule 7(3) was identical in wording to s 69(3) aforesaid.

Rule 7(3A) (introduced in 1998) was in the following terms.

> (3A) At the hearing of the appeal further evidence *shall not be admitted unless* the court is satisfied that:
>
> (a) At the hearing before the High Court of the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) The new evidence , if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the Subordinate Court, as the case may be.

[14] The Court of Appeal is no doubt vested with wide discretionary powers pursuant to s 69(1) CJA 1964 and r 7(1) of the RCOA 1994 to allow further evidence to be adduced at the hearing of an appeal *provided special grounds* had been shown (r 7(3) RCOA 1994).

[15] In construing what amounted to special grounds, (that is prior to the introduction of r 7(3A) of the RCOA 1994), our courts have followed the three conditions laid down by the English Court of Appeal in the landmark case of *Ladd v Marshall* [1954] 3 All ER 745. Our Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 reiterated the said three conditions

that had to be fulfilled to justify reception of further evidence at the appeal stage and listed them as follows: A

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; B

(3) The evidence must be such as presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible. C

[16] The Court of Appeal in *Hue Ngee On v Chai Woo Siew (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176, speaking through Low Hop Bing JCA held that the principles enunciated in *Ladd v Marshall* had now been accorded recognition in r 7(3A) (see also *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812). D

[17] In our considered view, the questions as to whether or not to receive fresh evidence at the hearing of the appeal was a matter within the wide judicial discretion of this court (r 7(1) and 7(3) of the RCOA, 1994) but guided or circumscribed in its exercise by the same principles as laid down in *Ladd v Marshall* which has now found statutory force within the words of r 7(3A) of the RCOA 1994; in other words, the same conditions had to be satisfied to admit fresh evidence at the appeal stage even with the introduction of r 7(3A) of the RCOA 1994. E F

[18] As the aforesaid conditions had been satisfied, we allowed the application with the following caveat to prevent any intermingling of documents and possible confusion that might arise as to the actual documents that were before the trial court. The appellant was ordered to file a separate Core-Bundle containing these additional documents now allowed, which would be treated at the hearing of the appeal in similar nature as a 'Non-Admitted' or 'ID Documents' only, subject to further submissions of the parties. G H

[19] *ENCLOSURE 26* was a similar application by the appellant to admit as further documents in the appeal record, the following: I

(a) The Police Report dated 28.3.2012 lodged by one Kuan Pek Seng against Cherng Chin Guan ('PW-1') for giving false evidence at the High Court trial from which this appeal emanates which is annexed and marked as Exhibit 'A-3' in the Affidavit in Support of this Application;

A

(b) The letter from the Commercial Crimes Division to Kuan Pek Seng dated 26.3.2013 and the Charge Sheet stating that PW-1 has been charged for perjury in the Magistrates Court which is annexed and marked as Exhibit 'A-4' and Exhibit 'A-5' respectively in the Affidavit in Support of this Application;

B

(c) Berita Terkini Online and The Star Online News Portal news reports dated 21.3.2013 that Cherng Chin Guan has been charged in the Magistrates Court for perjury in a civil case trial at the Kuala Lumpur High Court which is annexed and marked as Exhibit 'A-6' in the Affidavit in Support of this Application.

C

[20] We were informed by counsel for the appellant at the outset that the same documents sought to be included for reference at this appeal as identified above, had already been allowed in another appeal involving the same parties, namely, Civil Appeal No W-02–2904–12 of 2012 before this court. The
D respondent did not dispute this development.

[21] We were of the view that this court had to be consistent and accordingly proceeded to allow the appellant's application. The respondents were in any event not precluded from raising any issue as to relevance of those documents
E during the course of the submissions at the hearing of the appeal proper, should those documents or their contents be referred to by the appellants.

[22] We also ordered that an early date be fixed for disposal of the appeal
F proper and awarded respondents costs in the sum of RM5,000.

Applications allowed with costs of RM5,000.

Reported by Ashok Kumar

G

H

I